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In The

Supreme Court of the United States

October Term, 1990

CURTIS REID JOHNSON,

Petitioner,

vs.

HOME STATE BANK,

Respondent.

On Writ Of Certiorari To
The United States Court Of
Appeals For The Tenth Circuit

BRIEF OF RESPONDENT

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A. QUESTION PRESENTED FOR REVIEW

1. Whether a debtor, after receiving a discharge in Chapter 7 of a mortgage obligation secured by a promissory note, can file a subsequent Chapter 13 and schedule for payment the remaining *in rem* remedy in an effort to retain the property.

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No. 90-693

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BRIEF OF THE RESPONDENT

D. STATUTES INVOLVED

In addition to those statutes outlined in petitioner's brief, this case involves the following definition: 11 U.S.C. §101(9): "Creditor" means –

> (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor; . . .

E. STATEMENT OF THE CASE

The respondent (hereinafter "Bank") adopts the Statement of Facts filed by the petitioner (hereinafter "Johnson" or "debtor"), with the exception of the following additions and modifications.

On pages 3 and 4 of Johnson's brief, it is stated that the Johnsons executed mortgages to Travelers Insurance Company (hereinafter "Travelers") and the Bank on May 1, 1978, and June 2, 1978, respectively. However, the Johnsons actually executed promissory notes secured by mortgages to Travelers and the Bank on those dates. (Pet. Cert. App. 10)[1]

The Johnsons subsequently defaulted on their notes with the Bank, and on March 23, 1984, the Bank filed a foreclosure action against the Johnsons in the District Court of Edwards County, Kansas. *Id.*

Both the first mortgage held by Travelers and the second mortgage held by the Bank contain clauses whereby, in the event of a default, any royalty income received by the Johnsons from oil and gas leases on the property would be assigned to the mortgagees. *Id.*

In 1986, the Bank purchased the first mortgage of Travelers and, thus, became the owner of both mortgages. (Pet. Cert. App. 11). The first mortgage formerly owned by Travelers has never been foreclosed. Any oil and gas royalties received by the Bank have been pursuant to the unforeclosed first mortgage assignment.

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[1] A thorough discussion of the facts in this case is set forth in the United States District Court opinion. *In Re Johnson*, 96 B.R. 326 (D. Kan. 1989); Pet. Cert. App. 9-19.

On February 27, 1989, Johnson's motion for stay pending appeal was sustained. As a condition of the stay his proposed plan payments were to be paid to the trustee. (R-DC 24).

On May 4, 1989, the district court denied the Bank's motion to terminate or vacate the stay pending appeal. (R-DC 27). The Bank's motion was based upon the debtor's failure to make his second annual payment in the amount of $35,520.00 to stay the appeal. In denying the Bank's motion, the district court allowed Johnson to substitute a payment in the amount of $17,000.00 to be held by the trustee. *Id.* At no time did the Bank receive the $17,000.00 payment held by the trustee.

Johnson made no other plan payments to the trustee as required by the February 27, 1989, stay pending appeal. (R-DC 24, 37, 38, 43).

On December 22, 1989, the bankruptcy court issued an order approving Johnson's attorney's fees to be paid out of the $17,000.00 held by the trustee. (R-BC 86). On February 12, 1990, the district court also entered an order approving Johnson's attorney's fees to be paid from the $17,000.00. (R-DC 36).

On October 1, 1990, the district court disbursed the balance of funds held by the trustee to Johnson's counsel. (R-DC 48).

Johnson's five-year plan also proposes to make monthly payments to the trustee in the amount of $291.42 for Mid-Kansas Federal Savings & Loan (hereinafter "Mid-Kansas"), with a balloon payment of $7,222.77 for that institution. (JA 16-17).

Johnson's amended plan provides no payment to unsecured creditors and provides no cure to any arrearages. Johnson is delinquent in his payments under the plan in the amount of $109,890.00 as of December 1, 1990. (JA 14-25; Pet. Brief, p. 12).

F. SUMMARY OF THE ARGUMENT

The Tenth Circuit correctly held that a debtor's Chapter 13 plan cannot be confirmed where it improperly schedules a debt previously discharged under Chapter 7. The successive filing of a Chapter 7 bankruptcy and a Chapter 13 plan has been called a "Chapter 20" situation.

To allow a Chapter 13 plan to schedule *in rem* remedies ignores the Chapter 7 discharge. Chapter 7 provides a debtor with a discharge of "all debts" and "any liability on a claim." The effect of the discharge "voids any judgment" and prohibits creditors from considering "any discharged debt as a personal liability of the debtor, or from property of the debtor." 11 U.S.C. §524.

The Chapter 7 bankruptcy discharge destroys the traditional relationship between a mortgagor and mortgagee. As a result of the Chapter 7 discharge, the "debt" is extinguished. The remaining *in rem* remedy passes through the Chapter 7 discharge and is, thus, not a "debt."

Likewise, the Bank is not a "creditor" holding a "claim" on a "debt." The Tenth Circuit correctly characterized and interpreted these terms. The Bank does not

have a "claim" as defined in 11 U.S.C. §101(4). The Bank has no "right to payment" because Johnson's personal liability has been discharged under Chapter 7. Moreover, the Bank has no "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. §101(4)(B). As a result of the Chapter 7 discharge, the equitable remedy does not give rise to a "right to payment" as discussed in the legislative history to §101(4)(B). Furthermore, there is no longer anything for a debtor to breach.

The Bank's *in rem* remedy is not a "claim against the debtor" that includes a "claim against property of the debtor." 11 U.S.C. §102(2). The Code's rules of construction confirm that these phrases are not equivalent. The significant legislative history of 11 U.S.C. §102(2) establishes that there is not a nonrecourse loan agreement. The parties clearly bargained for a recourse loan. To reach the conclusion that an *in rem* remedy converts the parties' relationship into a "nonrecourse loan obligation" ignores the effect of the Chapter 7 discharge and other established Bankruptcy Code provisions. Allowing an *in rem* remedy to be considered a debt also forces a unilateral reaffirmation on the Bank.

Congress did not contemplate such results; it intended Chapter 13 and Chapter 7 of the Bankruptcy Code to be alternative, rather than supplemental, remedies.

Notwithstanding that the Bankruptcy Code and its legislative history do not contemplate that an *in rem* remedy is a "debt" in Chapter 13, the uncontroverted

facts in this case establish that Johnson's plan is not proposed in good faith and is not feasible.

G. ARGUMENT

This case presents the issue of whether a debtor, after receiving a discharge in Chapter 7 of a mortgage obligation secured by a promissory note, can file a subsequent Chapter 13 and schedule for payment the remaining *in rem* remedy in an effort to retain the property. This maneuver has been referred to as a "Chapter 20" bankruptcy.

1. "CHAPTER 20" JUDICIAL DETERMINATIONS

The "Chapter 20" issue is divided into two distinct lines of thought. The majority of the decisions, led by the Tenth Circuit decision in this case, have found that a debtor may not reschedule a "debt" in a Chapter 13 plan that had been discharged in a prior Chapter 7 bankruptcy.[2] The rationale supporting these cases is that the mortgagee no longer held a "claim against the debtor," but held only a lien against the debtor's property, since the mortgage obligations had been discharged in Chapter

[2] See, e.g. *In Re Johnson*, 904 F.2d 563 (10th Cir. 1990); *In Re Russo*, 94 B.R. 127 (Bankr. N.D. Ill. 1988); *In Re Reyes*, 59 B.R. 301 (Bankr. S.D. Cal. 1986); *In Re McKinstry*, 56 B.R. 191 (Bankr. D. Vt. 1986); *In Re Lawson*, 120 B.R. 859 (Bankr. W.D. Ky. 1990); *In Re Brown*, 52 B.R. 6 (Bankr. S.D. Ohio 1985); *Associates Financial Serv. Corp. v. Cowen*, 29 B.R. 888 (Bankr. S.D. Ohio 1983); *Matter of Fryer*, 47 B.R. 180 (Bankr. S.D. Ohio 1985); *In Re Hundley*, 99 B.R. 306 (Bankr. E.D. Va. 1989).

7. Since a lien was not accompanied by any note, obligation, debt, or right to payment, the creditor was no longer a "creditor" holding a "claim." *In Re Johnson*, 904 F.2d at 565. The majority of the decisions recognized that the "claim against the debtor" included "claim against property of the debtor." 11 U.S.C. §102(2). However, those courts acknowledged the significance of the legislative history of §102(2) regarding "nonrecourse loan agreements," and found no "claim against property of the debtor." Courts adhering to the majority view found no bargain or agreement for a nonrecourse mortgage loan. These cases also found that such a plan forced a unilateral reaffirmation of the debt upon a creditor and circumvented the disposable income requirement of §1325(b)(1)(B).

Johnson relies on decisions reaching the opposite result which conclude that a debtor may, through a Chapter 13 plan, cure arrearages and defaults on a mortgage debt previously discharged under Chapter 7.[3]

The cases cited by Johnson misconstrued an *in rem* remedy as a claim which could be amortized and discharged in a Chapter 13 plan. Those courts held that debtors were not personally liable on a debt in a Chapter 7 bankruptcy, but then construed the surviving lien, or *in*

[3] See, e.g. *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989); *Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987); *Grundy Nat. Bank v. Johnson*, 106 B.R. 95 (W.D. Va. 1989); *In Re Ligon*, 97 B.R. 398 (Bankr. N.D. Ill. 1989); *In Re Smith*, 94 B.R. 216 (Bankr. M.D. Ga. 1988); *In Re Klapp*, 80 B.R. 540 (Bankr. W.D. Okla. 1987); *In Re Lagasse*, 66 B.R. 41 (Bankr. D. Conn. 1986); *In Re Lewis*, 63 B.R. 90 (Bankr. E.D. Pa. 1986).

rem remedy, on real estate as a personal liability in the debtors' subsequently filed Chapter 13 cases. The minority view also found that upon the discharge of a secured debt, the debt relationship of the parties was converted to a nonrecourse loan obligation. These courts ignore that there was no agreement for a nonrecourse loan. The minority view also overlooked §102(2)'s illuminating legislative history. These courts then construed §102(2) as authority that a lien or an *in rem* remedy is a "debt."

It is interesting to note that in every decision cited by Johnson for his position, the court reviewed a Chapter 13 plan that cured arrearages and reinstated a previously-discharged mortgage debt. Johnson's plan does not cure arrearages or reinstate debt.

2. JOHNSON'S CHAPTER 7 DISCHARGE EXTINGUISHES ALL "CLAIMS" AND "DEBTS"

To allow a debtor to retain property, after a Chapter 7 discharge of personal liability on that property, by scheduling payments on the *in rem* remedy surviving the discharge, ignores the effect of the Chapter 7 discharge. A Chapter 7 discharge of personal liability affects the status of the parties in a subsequently filed Chapter 13 bankruptcy. The effect of that discharge must be considered.

11 U.S.C. §727(b) provides a Chapter 7 debtor with a discharge of "all debts" and "any liability on a claim." The effect of a debtor's discharge in 11 U.S.C. §524:

> *Voids any judgment* at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under §727. . . . (emphasis added).

According to the legislative history:

> Subsection (a) specifies that a discharge in a bankruptcy case . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or any act . . . to collect recover or offset any discharged debt as a *personal liability of the debtor*, or *from property of the debtor* . . . (emphasis added).

H.Rep. No. 95-595, 95th Cong., 1st Sess. 365-6 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 80 (1978).

Creditors may desire for the indebtedness to remain in place after a discharge; however, it does not. As a result of the discharge, a debtor's indebtedness is extinguished and the creditor's money judgment is void. *Chandler Bank of Lyons v. Ray*, 804 F.2d 577 (10th Cir. 1986). Johnson's promissory note, when reduced to judgment on February 9, 1987, became merged into the judgment.[4] Johnson was relieved of any personal liability on that judgment by Sections 727 and 524 of the Bankruptcy Code. All that remains is the Bank's right to an *in rem* remedy. Johnson inaccurately characterizes an *in rem* remedy as a liability, a debt, or an obligation. An *in rem* remedy is a right or remedy accruing to a creditor. Such right may or may not be exercised by the creditor. It is not an obligation flowing from the debtor. However, for Johnson's argument to be plausible, he must mischaracterize an *in rem* remedy as an obligation of a debtor.

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[4] *Anderson v. Anderson*, 155 Kan. 69, 123 P.2d 315 (1942).

In the present case, the relationship between the Bank and Johnson is not the ordinary relationship found in a Chapter 13 bankruptcy. Johnson's personal liability on his promissory notes to the Bank have been discharged in his Chapter 7 proceeding. While an *in rem* remedy survives or "passes through" the bankruptcy, an underlying debt clearly does not. *Chandler*, 804 F.2d at 579. What may have been a claim or debt in the Chapter 7 bankruptcy no longer exists as a result of the Code's discharge provisions and cannot be a claim or debt in a subsequent Chapter 13 proceeding.

The idea that the Bank's *in rem* remedy is a claim under the Bankruptcy Code not only ignores the effect of a discharge but unfolds a paradox. If, indeed, a claim does encompass *in rem* remedies, there would be no reason to file a Chapter 13 bankruptcy. The *in rem* remedy would simply be discharged along with a debtor's personal liability in Chapter 7. The remedies of the Code, including Chapter 13 bankruptcy, would be rendered superfluous. Secured status would no longer exist. Mortgages and promissory notes would be ineffective and unenforceable, because creditors would never be able to realize on their collateral.

The logical conclusion to Johnson's argument is that a "right to payment" survives only where there is a secured claim; i.e., where there is property or collateral. The Bankruptcy Code definition of "claim" does not distinguish a "right to payment" between secured claims and unsecured claims. Johnson realizes that the only way an *in rem* remedy could ever be construed as a debt is if the "right to payment" and, thus, the "claim" survived his Chapter 7 bankruptcy. The flaw in this theory is that, if the "right to payment" survives a Chapter 7 discharge,

then it survives discharge for both secured and unsecured claims in any bankruptcy chapter, unless specifically excepted by the Code.

3. UNDER THE BANKRUPTCY CODE AND ITS LEGISLATIVE HISTORY THE BANK IS NOT A "CREDITOR" WITH A "CLAIM" AGAINST A "DEBT"

Bankruptcy Code

As a consequence of the Chapter 7 discharge, the Bank's position is not that of a "creditor" as it relates to a Chapter 13 proceeding. Likewise, there is no "claim" or "debt" as those terms are defined.

The definitions of "creditor," "debt," and "claim" are crucial to the examination of the issue before this Court.

"Creditor," defined at 11 U.S.C. §101(9), means an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor; . . . "

"Debt," as defined at 11 U.S.C. §101(11), "means liability on a 'claim.' "

"Claim" is defined at 11 U.S.C. §101(4) and means:

(A) *right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) *right to an equitable remedy for breach of performance if such breach gives rise to a right to payment*, whether or not such right to an equitable remedy is reduced to judgment,

> fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. (emphasis added)

Since this case involves statutory construction, the starting point is with the text itself.

> In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.

Kelly v. Robinson, 479 U.S. 36, 43, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986).

The Tenth Circuit correctly held that the Bank does not hold a claim as defined by the Bankruptcy Code.[5] The Bank does not hold a "claim" because it does not hold a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment" as defined in 11 U.S.C. §101(4)(B). At most, the Bank has an *in rem* remedy. The Bank may foreclose upon the property, but it stretches the limits of the Code to construe the right to foreclosure as a "right to payment."

There is nothing for Johnson to "breach," which would give rise to a "right to payment" as provided in §101(4)(B) of the Code. Even if it could be construed that there was some type of breach by Johnson, it would not give rise to a "right to payment" because he has been discharged from any "right to payment" occasioned by a so-called "breach." Any equitable remedy a Bank may have can never give rise to a "right to payment" from a

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[5] Pet. Cert. App. 7; *In Re Johnson*, 904 F.2d 563, 566 (10th Cir. 1990).

debtor, upon the debtor's breach of performance, unless a new "debt" is created after discharge.

Legislative History

The meaning of the relevant Code provisions is not always evident. Numerous courts have wrestled with the definitions of "creditor," "claim," and "debt." As a result of the different interpretations, the courts of appeals are divided on this issue and have turned to the legislative history to clarify these definitions.[6] See *In Re Johnson*, 904 F.2d 563 (10th Cir. 1990); *Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987); *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989). This Court has also referred to the legislative history in examining the definitions of "debt," "claim," or "creditor." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990); *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986).

Section 101(4)(B)'s legislative history demonstrates what a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment" was not intended to address:

> . . . rights to an equitable remedy for a breach of performance with respect to which such breach *does not* give rise to a right to payment are *not* "claims" and would therefore *not* be susceptible to discharge in bankruptcy. (emphasis added).

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[6] Johnson also recognizes " . . . an understanding of the legislative history of the statutory provision[s] in question are necessary to a determination of this case . . . " Pet. Brief, pp. 26-27.

124 Cong. Rec. H 11,090 (daily ed. Sept. 28, 1978); S. 17,406 (daily ed. Oct. 6, 1978).

The legislative history specifies that the language in 11 U.S.C. §101(4)(B) was intended to:

> . . . cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused; in that event, the creditor entitled to specific performance would have a "claim" for purposes of a proceeding under title 11.

Id. Therefore, instead of an equitable remedy being discharged, a particular creditor would have a "claim" under the Bankruptcy Code because of the creditor's alternative "right to payment." The Bank does not have such an alternative "right to payment" or it would have been exercised seven years ago.

4. THE BANK DOES NOT HOLD A CLAIM AGAINST PROPERTY OF THE DEBTOR AS DEFINED BY 11 U.S.C. §102(2)

Johnson contends that the Bank holds a "claim" which can be administered in his Chapter 13 bankruptcy because 11 U.S.C. §102(2) provides " 'claim against the debtor' includes 'claim against property of the debtor.' " Johnson substitutes §102(2) into various Code sections to illustrate his point.[7] The same exercise may be completed by the Bank but with different results.

[7] See Pet. Brief, pp. 25-26.

To conclude that an *in rem* remedy is a "claim against the property of the debtor" and, thus, a "claim" ignores other relevant Bankruptcy Code provisions. Using all of the Code provisions at issue here rather than a single sentence or member of a sentence leads to quite opposite results. At the outset, it should be noted that Johnson would not even have this argument if not for his receipt of the property by quitclaim deed four days prior to his Chapter 13 filing.

The definitions of "debt" and "claim" should be used coextensively. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. at ___. Furthermore, "debt" means "*liability* on a claim." 11 U.S.C. §101(11). (emphasis added). Applying the definitions of "creditor," "debt," and "claim" into the phraseology of §102(2) used by Johnson results in the following:

> "liability" on a (right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment) against the debtor, including property of the debtor.

Using a holistic approach, the Bank is not a "creditor" holding a "claim" against a "debt" of the debtor. The clear language of the Bankruptcy Code provides that the liability and debt must still flow from the debtor regardless of whether there is a claim against property of the debtor. This statutory intent is buttressed by the fact that the definition of creditor means a "claim against the debtor," not a claim against a third party, cosigner, mortgagee, pledgor, or parent. 11 U.S.C. §101(9).

The fallacy of Johnson's argument is that it construes "claim against property of the debtor" to mean exactly

the same as "claim against the debtor," and therefore, he uses them interchangeably. The language of 11 U.S.C. §102(2) reads, "includes" rather than "means."

The Bankruptcy Code defines some terms by use of the word "means," while others read "includes." Those stating a definition in terms of "means" attempt a precise definition. The definitions using the term "include(s)" are not to exclude other definitions of the term. 2 *Collier on Bankruptcy* ¶101.00(2) (15th Ed. 1990). By using "includes" rather than "means," Congress specifically indicated its intent that "claim against property of the debtor" is not equivalent to "claim against the debtor." Furthermore, "claim against property of the debtor" does not, under the Code, include "claim against the debtor" because Congress did not use the word "means." Assuming arguendo that a creditor holds a "claim against property of the debtor," it must still hold a "claim against the debtor" and, thus, a "claim," because the definition does not flow in reverse. The Bank clearly has no claim as defined in 11 U.S.C. §101(4).

The legislative history of 11 U.S.C. §102(2) also reveals that the definition of "claim against the debtor" was not intended to address an *in rem* remedy or right to an equitable remedy as held by the Bank:

> Paragraph (2) specifies that "claim against the debtor" includes claim against property of the debtor. This paragraph is intended to cover *nonrecourse loan agreements* where the creditor's only rights are against property of the debtor, and not against the debtor personally. Thus, such an agreement would give rise to a claim that would be treated as a claim against the

> debtor personally, for the purposes of the Bankruptcy Code. . . . (emphasis added).

H.Rep. No. 95-595, 95th Cong., 1st Sess. 316 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 28 (1978).

Johnson adopts the position that when a debtor receives a discharge of his secured debt, the debt relationship between the parties is changed to a nonrecourse obligation, which may be cured in a Chapter 13 plan. *In Re Lagasse,* 66 B.R. 41, 43 (Bankr. D. Conn. 1986). The Ninth and Eleventh Circuits simply adopt the *Lagasse* rationale without analysis and with little explanation of their decisions. *Matter of Metz,* 820 F.2d 1495 (9th Cir. 1987); *In Re Saylors,* 869 F.2d 1434 (11th Cir. 1989). Based upon the *Lagasse* rationale that successive bankruptcy filings were acceptable, *Metz* and *Saylors* concluded that the inquiry was whether the debtor submitted the Chapter 13 plan in good faith.

The Tenth Circuit rejected the proposition that a mortgage debt, discharged in Chapter 7, could be transformed into a nonrecourse loan agreement and, thus, subject to cure through a subsequent Chapter 13 plan. In reaching this conclusion, the Tenth Circuit closely examined the statutory language and legislative history of the Bankruptcy Code. This analysis went beyond the reasoning of either *Metz* or *Saylors.* Based upon this in-depth review, the Tenth Circuit determined that the Bank was not a "creditor," since the lien remaining after a Chapter 7 discharge was not a "claim against the debtor." Moreover, the Tenth Circuit found that the transformation of a debt into a nonrecourse loan agreement was inconsistent with the Bankruptcy Code provisions and the Congressional intent of §102(2). The Tenth Circuit found no "agreement"

between Johnson and the Bank for a nonrecourse mortgage loan.

The present case does not involve a nonrecourse loan agreement. As a result of the Chapter 7 discharge, the traditional mortgagor-mortgagee relationship no longer exists. The promissory note secured by the mortgage has merged into the judgment. The promissory note is no longer evidence of a debt that can be made the basis of a subsequent action.[8] The Bank holds only an *in rem* remedy, which is not accompanied by any obligation, liability, note, debt, or right to payment. Thus, the Bank's *in rem* remedy is not such an agreement that would give rise to a claim that would be treated as a claim against the debtor personally for purposes of the Bankruptcy Code, as contemplated by the legislative history of 11 U.S.C. §102(2).

To reach the conclusion that an *in rem* remedy converts the whole note to a "nonrecourse loan agreement," one must ignore the effect of a Chapter 7 discharge, disregard personal liability, discard essential elements of contract law relating to promissory notes, and focus only on the surviving *in rem* remedy. For the foregoing reasons, the Code and its legislative history do not support such a narrow focus.

It is apparent from a review of the whole law, the definitions, and legislative history of "claim," "claim against the debtor," "claim against property of the debtor," and nonrecourse loan agreements that the Bank's *in rem* remedy is not a claim.

[8] *Anderson v. Anderson*, 155 Kan. 69, 123 P.2d 315 (1942).

5. CHAPTER 13 PROVIDES ALTERNATIVE RATHER THAN SUPPLEMENTAL RELIEF TO CHAPTER 7

Congress intended Chapter 13 and Chapter 7 of the Bankruptcy Code to be alternative, rather than supplemental, remedies.[9]

The "wage earner" provisions of Chapter XIII were added to the Bankruptcy Act to provide "a remedy for the dilemma facing a debtor seeking to repay, rather than avoid, his obligations . . ."[10] The purpose of Chapter XIII under the Bankruptcy Act of 1898 was to permit an individual to repay debts.[11] The legislative history accompanying the Bankruptcy Code enacted in 1978 by Congress notes that the purpose of the new Chapter 13 is to enable individuals to repay debts, as opposed to a Chapter 7 liquidation case, where debtors surrender nonexempt assets for liquidation and sale by the trustee.[12] In

[9] *In Re Silva*, 82 B.R. 845, 846 (S.D. Ohio 1987).

[10] *Perry v. Commerce Loan Co.*, 383 U.S. 392, 395, 86 S.Ct. 852, 15 L.Ed.2d 827 (1966).

[11] S.Rep. No. 95-989, 95th Cong., 2d Sess. 12 (1978).

[12] The new Chapter 13 undertakes to solve these problems insofar as bankruptcy law can provide a simply yet precise and effective system for *individuals to pay debts* under bankruptcy court protection and supervision. . . . " S.Rep. No. 95-989, 95th Cong., 2d Sess. 13 (1978). (emphasis added).

"The purpose of Chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period. . . . "

(Continued on following page)

enacting the Bankruptcy Code, Congress specifically provided for liquidation cases under Chapter 7 and rehabilitation or adjustment of debts of an individual with regular income under Chapter 13.[13] Rather than filing a Chapter 13 bankruptcy plan in the first instance, Johnson elected to file a Chapter 7 liquidation. The Chapter 7 discharge of unsecured debt enabled Johnson to become eligible as a debtor in Chapter 13.[14] At no time did Johnson seek reaffirmation of any of his debts. Congress did not contemplate, or intend to sanction, a debtor's Chapter 13 plan rescheduling a prior "debt" on the heels of his *in personam* Chapter 7 discharge.

11 U.S.C. §706 also indicates Congressional intent to provide alternative remedies under the distinct chapters of the Bankruptcy Code. Section 706 implicitly allows a one-time conversion from Chapter 7 liquidation to a reorganization, or individual repayment case under Chapter

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"The benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his non-exempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors. . . . " H.Rep. No. 95-595, 95th Cong., 1st Sess. 118 (1977).

[13] See, 11 U.S.C. §701 et seq. and 11 U.S.C. §1301 et seq.

[14] 11 U.S.C. §109(e) provides that "only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 . . . may be a debtor under chapter 13 of this title."

11, 12, or 13. This is a further indication that the Bankruptcy Code was intended to provide alternative forms of relief.[15] Johnson had the opportunity to convert his Chapter 7 bankruptcy but did not. Instead, he utilized the discharge provisions of Chapter 7 to eliminate enough unsecured debt to become eligible as a "debtor" in Chapter 13.[16] He then proposed a Chapter 13 plan to discharge *in rem* remedies he could not discharge in his Chapter 7 proceeding. It was Congress' aim to allow a one-time conversion but not to allow the successive filing of a Chapter 13 after having been discharged in Chapter 7 bankruptcy. For example, 11 U.S.C. §706(d) specifies " . . . a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." Yet, Johnson's Chapter 13 plan attempts a maneuver specifically forbidden by §706(d), since his unsecured debt exceeded the limits in §109(e) of the Bankruptcy Code. Johnson's attempted "quasi-liquidation" under Chapter 13 bankruptcy circumvents the clear prohibitions of Chapter 7 of the Bankruptcy Code. There is nothing to suggest Congress intended such a circumvention of the provisions of the Bankruptcy Code. Otherwise, §706 and other chapters of the Code would be mere surplusage. The differences preserved by various chapters in the Code evidence Congressional intent to have alternative remedies. "Congress surely intended that a debtor achieve its goals by the filing of a single case. This Court considers it a misuse of the bankruptcy

[15] See, H.Rep. No. 95-595, 95th Cong., 1st Sess. (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. (1978).

[16] See, 11 U.S.C. §109(e).

process to file one case, then, failing to achieve the intended goals, to refile a second case." *In Re Russo*, 94 B.R. 127, 129 (Bankr. N.D. Ill. 1988).

6. "CHAPTER 20" BANKRUPTCY PLANS ARE CONTRARY TO THE PROVISIONS OF THE BANKRUPTCY CODE

Before a Chapter 13 plan can be confirmed, a debtor must satisfy the requirements of 11 U.S.C. §1325. Section 1325(a)(4) states:

> The value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

Johnson's Chapter 13 plan proposes to pay *his* estimate of the value of the land with minimal yearly payments and a balloon payment of $80,625.92 at the end of his five-year plan. (JA 14-20). Johnson's plan provides no payment for unsecured or undersecured claims. If the estate of the debtor were liquidated under Chapter 7, the Bank would receive more than the value of the plan payments as of the effective date of the plan. The Bank would receive the property and not have to accept minimal payments spread over five years. Due to Johnson's discharge of his unsecured debt and his proposed balloon payment at the end of five years, he is able to effectively nullify the provisions of §1325(a)(4).

Whether the right of a debtor to surrender property to a mortgagee is a "right to payment" is not at issue here. A surrender of the property was never suggested in

Johnson's plan because retention of the property for minimal payment is the compelling reason his Chapter 13 bankruptcy was filed. If the property is not retained, then Johnson has no income or government subsidies to fund the plan. If such a surrender of property would have occurred, there would have been no bankruptcy estate.

The confirmation of Johnson's Chapter 13 plan would circumvent the requirement of 11 U.S.C. §1325(b)(1)(B) that all of "debtor's" disposable income be applied to plan payments.

> In the Chapter 7 the slate is wiped clean of unsecured debts. In the subsequent Chapter 13, even if the debtor has disposable income that would have been available to pay unsecured creditors, it is not necessary to do so because there are no unsecured debts, all of them having been discharged in the prior Chapter 7.

In Re Russo, 94 B.R. 127, 130 (Bankr. N.D. Ill. 1988)

If the plan is confirmed, the Bank will essentially be required to make a new loan to Johnson; one without personal liability.

Sections 521 and 524 of the Bankruptcy Code permit a debtor to reaffirm a debt in Chapter 7. Under those provisions, reaffirmation is a voluntary agreement. It cannot be forced upon either debtors or creditors. At no time did Johnson avail himself of the rights under these provisions to cure or reaffirm his Chapter 7 debt. Filing a Chapter 13 bankruptcy compelling a creditor to accept payments after a Chapter 7 discharge forces a unilateral reaffirmation upon that creditor. 11 U.S.C. §524(c); *In Re McKinstry*, 56 B.R. 191, 193 (Bankr. D. Vt. 1986); *In Re Russo*, 94 B.R. at 129. "Section 524 of 11 U.S.C. is a

debtor's shield against the continuation of acts to collect a discharged debt. It cannot be used as a sword to compel a creditor to reaffirm a debt within a Chapter 7 case, nor to force a reaffirmation in a subsequent Chapter 13 case." *In Re McKinstry*, 56 B.R. at 193.

Johnson is not only attempting a unilateral reaffirmation, but is also endeavoring to reaffirm only part of the debt. Johnson does not seek to reaffirm any of the unsecured debt discharged in his Chapter 7. Neither does he want to reaffirm any debt he characterizes as undersecured in his Chapter 13 plan.

Successive bankruptcy filings improperly extend, or reimpose, the automatic stay provisions of 11 U.S.C. §362.[17]

> The automatic stay is one of the most powerful weapons known to the law. It arises not from an order of the court after a hearing on the merits, but upon the mere filing of a case. It is a Congressionally-imposed stay, not a judicially-imposed stay.
>
> In the absence of extraordinary circumstances, its reimposition in a second case filed within one month after the closing of a prior case should not be viewed with favor by the courts.

In Re Russo, 94 B.R. at 129.

Johnson has benefited from the automatic stay provisions since October 9, 1984, when his Chapter 7 petition was filed. In early 1985, the Bank received relief from the

[17] *In Re Russo*, 94 B.R. at 128; citing *In Re Gates*, 42 B.R. 4 (Bankr. N.D. Ga. 1983); *In Re Perez*, 43 B.R. 530 (Bankr. S.D. Tex. 1984); *In Re Hill*, 34 B.R. 21 (Bankr. M.D. Fla. 1983).

automatic stay, but such stay was reimposed by the filing of Johnson's Chapter 13 bankruptcy. The reimposition of the stay prevented a sheriff's sale of the property. On the one hand, the Bank received relief from the automatic stay and Johnson received a discharge in his Chapter 7, while on the other hand, another stay has been imposed by his Chapter 13 petition. This inconsistent application of the automatic stay provisions was not contemplated by Congress. Otherwise, any relief from the automatic stay would be meaningless. The continuing imposition of the automatic stay also extends Johnson's right to redeem property under Kansas law.[18] Johnson's "Chapter 20" plan has, so far, expanded his six-month redemption period to over seven years. What is even more ominous is that Johnson is painfully close to completing the six-year bar to refiling another Chapter 7 bankruptcy and imposing yet an additional automatic stay with rights to convert the case to Chapter 13.

Johnson's plan also vitiates the six-year filing requirement in §727 of the Bankruptcy Code. Johnson was barred from filing another Chapter 7 bankruptcy, so, instead, he filed a Chapter 13 plan proposing to pay the value of the property after the discharge of unsecured debt. This Chapter 13 proposal is nothing more than a veiled Chapter 7.

Johnson's Chapter 7 proceeding had also not yet been closed when he filed his Chapter 13 plan. A determination of unsecured claims and objections to the trustee's intended distribution of estate funds was not made until

[18] Kansas Statutes Annotated 60-2414; See, Pet. Brief, p. 20.

March 10, 1988.[19] At one time, Johnson had two estates being administered by two trustees, one under Chapter 7 and one under Chapter 13 of the Bankruptcy Code. This is clearly contrary to the function and purpose of the Bankruptcy Code. In *Associated Financial Serv. Corp. v. Cowen*, 29 B.R. 888, 894 (Bankr. S.D. Ohio 1983), the court stated:

> The filing of a petition in bankruptcy creates an estate consisting of the debtor's property . . . [a] debtor possesses only one estate for the purpose of trusteeship . . .
>
> The filing of two simultaneous petitions is contrary to the obvious contemplated function of the Bankruptcy Code to resolve debtors' financial affairs by administration of a debtor's property as a single estate under a single Chapter within the Code. 11 U.S.C. §§ 103, 301, 302, and 303. The Bankruptcy Code provides different discharge remedies in different Chapters, and such remedies are intended to be exclusive for each estate. 11 U.S.C. §§ 103, 301, 523, 727, and 1328.

Upholding the Tenth Circuit's decision in this case will not affect the precedent of *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990). In *Davenport*, the debtors were convicted of welfare fraud and sentenced to probation. As a condition of the probation, they were required to make restitution payments. This Court concluded that restitution orders were "debts" as defined in §101(11), because

[19] The facts described in this paragraph are not in the record because they occurred in Johnson's Chapter 7 bankruptcy. These facts are not disputed.

if restitution obligations were not paid, debtors risked the threat of revocation of probation and incarceration. Therefore, a restitution order is an enforceable obligation, hence, a "right to payment," and a "debt." In the present case, the Bank has a right to an equitable remedy (foreclosure) whether or not Johnson pays. Furthermore, Johnson has no obligation to pay anything. The Bank has no enforceable obligation because there is no "debt" or "right to payment."

In *Davenport*, Justice Marshall, delivering the opinion of the court, stated:

> Had Congress believed that restitution obligations were not "debts" giving rise to "claims," it would have had no reason to except such obligations from discharge in §523(a)(7).

495 U.S. at ___. Had Congress intended such *in rem* remedies to be "debts" giving rise to "claims," it could have excepted such remedies from discharge in U.S.C. §523 as it did for the penal sanctions discussed in *Davenport*.

In Section 523 of the Code, Congress prevented debtors from discharging certain debts based upon public policy grounds. However, Congress intended a broader discharge for Chapter 13 debtors than those in Chapter 7 because some, but not all, of the exceptions to discharge in §523(a) were extended to Chapter 13 bankruptcies.[20]

[20] "The super discharge of Chapter 13 was provided by Congress as an incentive for the debtor to commit to a repayment plan under Chapter 13 as an alternative to providing creditors nothing under Chapter 7. Given the proper case, the

(Continued on following page)

Davenport held that restitution obligations were dischargeable debts in Chapter 13. Otherwise, Congress would not have excepted such obligations from Chapter 7 discharge in §523. On the other hand, *in rem* remedies survive or pass through the bankruptcy, while "debts" are extinguished.[21] If Congress had intended for *in rem* remedies to be "debts" giving rise to "claims" that are nondischargeable in Chapter 7 but dischargeable in Chapter 13, such provisions would have been codified. Since *in rem* remedies are not listed as exceptions to sections 523 or 1328, they are not "debts."

If Congress had intended, by §523 of the Code or any other provision, to discharge *in rem* remedies, "we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and

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court need not, and should not, neutralize that incentive by confirming Chapter 13 plans that are, in essence, veiled Chapter 7 cases. Logic requires there be an articulate standard distinguishing entitlement to dischargeability under Chapter 13 vis-a-vis Chapter 7. To put it otherwise, there must be criteria which preclude bypass of nondischargeability under Chapter 7 simply by detouring or converting to Chapter 13. Where there is an absence of any significant factual element distinguishing the circumstances of a Chapter 13 petition with a substantial nondischargeable debt from those attendant to a Chapter 7 petition, the debtor should not be permitted to nullify a major provision of 11 U.S.C. §523 merely by paying an insignificant portion of the nondischargeable debt." *In Re Warren*, 89 B.R. 87, 95 (9th Cir. BAP 1988). See also H.R. Committee Print No. 16, 96th Cong., 2d Sess. (1981). See also 11 U.S.C. §1328.

[21] See, discussion, supra at 8-11.

so likely to arouse public outrage." *United States v. Ron Pair Enterprises*, 489 U.S. 235, ___, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

7. JOHNSON'S CHAPTER 13 PLAN WAS NOT PROPOSED IN GOOD FAITH AND IS NOT FEASIBLE

While not reaching the good faith and feasibility issues because of its decision on the "Chapter 20" issue, the Tenth Circuit indicated the Bank presented compelling arguments on both issues. *In Re Johnson*, 904 F.2d at 566 (10th Cir. 1990).

It is the general rule that the Bank, the prevailing party, can "defend its judgment on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n.20, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979).

The bankruptcy court, in confirming Johnson's Chapter 13 plan, only addressed the good faith of the debtor in the context of successive bankruptcy filings. Since successive filings were not bad faith *per se*, the bankruptcy court held there was no indication of bad faith on the part of the debtor to prohibit confirmation of the plan. Likewise, a perfunctory review resulted in the finding that Johnson's plan was feasible.

The bankruptcy court's findings of fact are usually accepted, unless they are clearly erroneous.

Fed.R.Bankr.P. 8013; Fed.R.Civ.P. 52(a). The clearly erroneous standard is not applicable, however, when reviewing the bankruptcy court's rulings on questions of law or on mixed questions of law and fact. *In The Matter of Tri-State Equipment Co., Inc.*, 792 F.2d 967 (10th Cir. 1986); *In Re Golf Course Builders Leasing, Inc.*, 768 F.2d 1167 (10th Cir. 1985); *Stafos v. Jarvis*, 477 F.2d 369 (10th Cir. 1973), *cert. denied*, 414 U.S. 944 (1973). While the bankruptcy court made clearly erroneous findings of fact, most of the relevant facts in this case are uncontroverted and established. Mixed questions of fact and law arise "when the facts are admitted or established and the law is undisputed." *In the Matter of Tri-State Equipment Co., Inc.*, 792 F.2d at 970.

> If what must be decided in a mixed question involves primarily a consideration of legal principles, then the appellate court reviews *de novo*.

Id.

Consequently, the record related to the good faith and feasibility of the plan can be reviewed *de novo*.

The majority of circuits have adopted a "middle road" approach to the good faith issue. *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983). Each case is judged on its own facts after considering all circumstances. Several factors have been outlined for the guidance of bankruptcy courts. Application of the factors enumerated in *Flygare* and other cases to the findings made by the bankruptcy court as well as the undisputed evidence, leads to the reasonable conclusion that Johnson's plan was not proposed in good faith and therefore cannot be confirmed.

The Totality Of The Circumstances Displays The Lack Of Good Faith

A debtor's Chapter 13 plan must be "proposed in good faith and not by any means forbidden by law." U.S.C. §1325(a)(3). The term "good faith" is not defined in the Code or in the legislative history. Definitions and standards for determining good faith are not scarce. Although by no means universal, the majority of the courts generally conclude that a debtor's good faith should be determined on a case-by-case basis, considering the "totality of the circumstances."[22] This inquiry ultimately determines whether the plan conforms to the provisions, purpose and spirit of Chapter 13. *In Re Hundley*, 99 B.R. 306, 309 (Bankr. E.D. Va. 1989).

The bankruptcy court found "the record contains no indication that the debtor proposed his plan in bad faith." (R-BR 44; Pet. Cert. App. 30). This finding is clearly

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[22] See, *In Re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1988); *Flygare v. Boulden*, 709 F.2d 1344, 1347-1348 (10th Cir. 1983); *In Re Rasmussen*, 888 F.2d 703, 706 (10th Cir. 1989); *In Re Kitchens*, 702 F.2d 885, 888-889 (11th Cir. 1983); *Public Finance Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir. 1983); *Deans v. O'Donnell*, 692 F.2d 968, 972 (4th Cir. 1982); *In Re Estus*, 695 F.2d 311, 316-317 (8th Cir. 1982); *In Re Rimgale*, 669 F.2d 426, 432 (7th Cir. 1982). See also *Barnes v. Whelan*, 689 F.2d 193 (D.C. Cir. 1982); *In Re Johnson*, 708 F.2d 865, 868 (2nd Cir. 1983) (good faith is defined as "honesty of intention"); *In Re Goeb*, 675 F.2d 1386 (9th Cir. 1982) (determination of whether the debtors "acted inequitably"); *In Re Chinichian*, 784 F.2d 1440, 1444 (9th Cir. 1986) (intentions of the debtor and the legal effect of the confirmation of a Chapter 13 plan in light of the spirit and purpose of Chapter 13 are examined).

erroneous when applying the present uncontroverted facts to the applicable law.

In the mid-seventies, Johnson inherited the property at issue, which was free from any encumbrances. The property had producing oil and gas wells, from which Johnson received royalty payments. (R-BC 20). In 1978, Johnson borrowed money from Travelers and the Bank and in exchange executed promissory notes and mortgages. Johnson defaulted on the notes in 1983.[23] By that time he had amassed debt secured by the property in excess of $500,000.00. (R-BC 20).

Based on the default, the Bank initiated the foreclosure action on March 23, 1984. While the foreclosure action was proceeding, Johnson and his wife, on September 7, 1986, executed a deed to their son, transferring all of their ownership rights in the property at issue. Approximately one month later the Johnson's joint Chapter 7 bankruptcy was filed. On April 11, 1985, the Johnsons received their Chapter 7 discharge.[24]

Following the entry of an *in rem* judgment, sheriff's sale, appeal to the Kansas Supreme Court and an entry of a second *in rem* judgment after remand, the Bank scheduled a second sheriff's sale for April 3, 1987.[25]

On February 24, 1987, Johnson's wife, son and daughter-in-law executed quitclaim deeds to Johnson,

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[23] These facts are not disputed. See, Pet. Brief, pp. 3-4, n.1, n.2.

[24] The facts in this paragraph are not disputed. See, Pet. Brief, pp. 3-7, n.1, n.2.

[25] *Id.*

consolidating ownership of all subject property at issue in Johnson. Those deeds were filed for record on February 26, 1987. Four days later, on March 2, 1987, and one month before the scheduled April 3, 1987, sheriff's sale, Johnson filed his voluntary Chapter 13 petition.[26]

The acts of Johnson exemplify the exact type of abuse of process which the bankruptcy court should have considered bad faith but ignored.[27] Johnson has transferred property back and forth between his family to the detriment of the Bank, to avoid foreclosure sale and to gain advantage in his bankruptcy proceedings. His actions clearly establish the insincerity of his motives in seeking Chapter 13 relief. Further evidence of Johnson's improper motives is evident from his testimony in which he admitted that the purpose of the September, 1984, deed was to keep property from the trustee in his Chapter 7 bankruptcy.[28] Yet, the bankruptcy court below found no evidence of the debtor's bad faith. (R-BR 44; Pet. Cert. App. 30)

The Chapter 13 plan proposed by Johnson further establishes evidence of the lack of his good faith. Rather than scheduling payments over a three year period, Johnson proposed yearly payments over five years. Three-year plans are the general rule, unless cause is found for a longer period. 11 U.S.C. §1322(c). The bankruptcy court made no specific finding that cause existed to extend the payments over the maximum time permitted.

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[26] *Id.*

[27] R-BC 44; Pet. App. 30, n.3.

[28] R-BC 35; Tr. 6-23-87 at 64.

At the conclusion of five years, a balloon payment representing one-third of the payments will be due to the Bank. Plans proposing large balloon payments at the end are not feasible and reflect on good faith. *Matter of Brunson*, 87 B.R. 304 (Bankr.D.N.J. 1988); 5 *Collier on Bankruptcy* §1325.07 (15th Ed. 1990).

In order to meet this balloon payment, the bankruptcy court erroneously found that Johnson would be required to borrow approximately 56% of the market value of the property.[29] In actuality, the debtor would be required to borrow 163% of the appraised value of the property.[30]

The proposal for substantial borrowing at the conclusion of the plan is unrealistic, given the additional proposed borrowing for farm operations.[31]

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[29] R-BR 44; Pet. Cert. App. 31.

[30] The 163% figure is calculated as follows:

$ 80,625.92	Bank's balloon payment (R-BC 24; JA 20)
7,222.77	Other creditor's balloon payment (R-BC 24; JA 17)
72,000.00	1992 operating loan (R-BC 36; JA 70)
47,750.00	1991 operating loan (JA 63)
19,425.00	December 1, 1991, final payment (R-BC 24; JA 19)
$227,023.69	

$227,023.69 divided by $139,500.00 as the debtor's estimate of the market value equals 163%. (R-BC 20).

[31] Johnson's cash flow statements indicate the following amounts would need to be borrowed to operate the farm:

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The projected income included in the plan, less necessary expenses, would be inadequate to support the proposed borrowing and the scheduled payments. The income was expected to come from four sources: oil and gas royalties, custom work, government subsidies and crops. (JA 21, 26-72). The record reveals that the sources and amounts are speculative, exaggerated, dependent on factors outside of the debtor's control such as weather and prices, and fail to consider expenses necessary to generate the income.

Additional proof of the lack of good faith is apparent by comparing the first plan submitted with the later plan. Annual home expenses decreased by over fifty percent. Johnson deleted all expense attributable to the Mid-Kansas "debt" which he proposes to pay under his plan. Personal property taxes and support payments for Johnson's daughters were deleted without any explanation. Remaining expenses were reduced considerably. (Compare JA 11-12 and JA 36; R-BC 19 and R-BC 24).

The only participants in the plan are lien holders: the Bank and Mid-Kansas. There are no payments proposed to unsecured creditors. Johnson does not intend to cure his default on either mortgage by making payments on arrearages.

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1987	$ 35,000.00 (JA 35)
1988	28,750.00 (JA 42)
1989	30,000.00 (JA 49)
1990	30,000.00 (JA 56)
1991	47,750.00 (JA 63)
1992	152,625.00 (JA 70).

Since the submission of the plan in 1987, Johnson has received farm income and government subsidies.[32] Since 1987, only one payment under the plan has been made to the Bank. As of December, 1990, the debtor was delinquent on his plan payments in the sum of $109,890.[33] Even though the property at issue remains in Johnson's possession, he has consistently failed to pay his real estate taxes. The Bank has had to either pay the taxes or seek court order to compel Johnson to pay the taxes.[34]

The totality of the circumstances surrounding Johnson's Chapter 13 bankruptcy and the proposed plan clearly indicate that good faith and feasibility do not exist.

The bankruptcy court erroneously concluded that the plan was submitted in good faith on the sole factor of successive bankruptcy filings. This conclusion ignored the Bank's other objections. (R-BC 13, 17, 31, 33). A much broader inquiry into all circumstances must be conducted before a plan can be confirmed. *Flygare*, 709 F.2d at 1347-48.

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[32] As a result of Johnson's retention of the property, he estimated he would receive government payments in the following amounts:

1987	$18,951.00	
1988	44,781.00	
1989	47,605.00	
1990	49,243.00	
1991	29,494.00	(JA 21).

[33] These facts are not disputed. see, Pet. Brief, pp. 7, 12.

[34] R-BC 16; R-BC 64.

The Ninth and Eleventh Circuits incorrectly relied on evidence related to a single factor, successive filings, to find good faith on the part of a Chapter 13 debtor. While the Court in *Metz* acknowledged the "middle road" approach, very few factors were considered. It is significant to note, however, that at least the debtor in *Metz* proposed to cure his arrearage on his mortgage debt, plus pay interest on the arrearage and keep the mortgage payments current. *Metz*, 820 F.2d at 1498.

In *Saylors*, the Eleventh Circuit merely concentrated on the debtor's timing of his successive bankruptcy filings. Again, the debtor proposed to cure his mortgage arrearage and keep his mortgage payments current. However, any analysis of other factors pointing toward the debtor's good faith is absent.

For the above reasons, Johnson's Chapter 13 plan was not proposed in good faith because it improperly proposed debt avoidance rather than rehabilitation and repayment, the intended purpose of Chapter 13.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court affirm the decision of the Tenth Circuit Court of Appeals based either upon the holding that a debtor may not reschedule a debt previously discharged in a Chapter 7 bankruptcy or upon the uncontroverted facts indicating Johnson's lack of good faith and nonfeasibility of his plan, which also support the Tenth Circuit's decision. In the alternative, if this Court decides to reverse the decision of the Tenth Circuit Court of

Appeals, then the Bank respectfully requests this Court grant its petition for certiorari, Case No. 90-834, so that issues of good faith and non-feasibility may be addressed.

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